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delivered to Justice Justice Justice

June 18, 2010

RECEIVED
FEDERAL ELECTION
COMMISSION
2010 JUN 18 PM 3:12
OFFICE OF GENERAL
COUNSEL**Via Facsimile and Overnight Delivery**Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463Re: Response to MUR 6280 on Behalf of Daniel Lowenstein, Fredric D. Woocher,
and Michael Berman

Dear Mr. Jordan:

This letter is filed on behalf of Daniel Lowenstein, Fredric D. Woocher, and Michael Berman (collectively referred to as the "Yes on FAIR Respondents") in response to the Complaint filed in the above-referenced matter by Voters FIRST Act for Congress. As explained below, the Complaint is without merit and should be dismissed immediately.

FACTUAL BACKGROUND

In 2008, California voters narrowly approved Proposition 11, which stripped the democratically elected California Legislature of its responsibility for redistricting State Assembly, Senate, and Board of Equalization Districts, and instead assigned the task to an unelected and unaccountable 14-member commission. One of Proposition 11's principal underwriters, Charles T. Munger, Jr., has now qualified another measure for the California ballot — the so-called "Voters FIRST Act for Congress." The Voters FIRST Act would assign the task of redrawing California's congressional district boundaries to the same 14-member commission. In addition, the Voters FIRST Act would mandate that State Assembly, State Senate, State Board of Equalization, and California congressional districts all be segregated according to "similar living standards" and that districts include only people with "similar work opportunities." Mr. Munger is the sole financier of this measure, which has qualified to appear on the November 2010 California general election ballot.

Concerned about entrusting 14 inexperienced and unaccountable individuals with the task of redrawing district boundaries, and troubled by the fiscal waste that has resulted from the initial efforts to implement Proposition 11, Daniel Lowenstein has led an effort to draft and qualify the "Financial Accountability in Redistricting" Act (the "FAIR Act") for the California ballot. The FAIR Act would ensure that the California Legislature — which is directly accountable to the

10044283035

Jeff S. Jordan
June 18, 2010
Page 2

voters — would retain responsibility for drawing State Assembly, State Senate, State Board of Equalization, and California congressional districts. It would also cap expenditures at \$2.5 million for all redistricting activities in a given decade, resulting in significant taxpayers savings compared to Proposition 11. And the FAIR Act would ensure that only neutral, good-government criteria are considered in the drawing of district lines. The FAIR Act has gathered sufficient signatures to qualify for the ballot and is currently awaiting certification. If certified by the California Secretary of State on or before June 24, 2010, the FAIR Act will also appear on California's November 2010 general election ballot.

Mr. Lowenstein worked with a team of experts to draft the FAIR Act, and he is the official proponent of the measure as reflected in Exhibit A to the Complaint. See Complaint, Exh. A, unnumbered page 1 (attaching Dec. 28, 2009 letter from Mr. Lowenstein to the California Attorney General's Office requesting the preparation of an official "title and summary"); Cal. Elec. Code § 342 (defining "proponent"). He is also one of two principal officers of the state committee that was formed to support the qualification and passage of the FAIR Act. See Complaint, Exh. B (attaching Yes on FAIR's Statement of Organization (Form 410), which was filed with the California Secretary of State). The other principal officer, Fredric D. Woocher, is the committee's treasurer. The official name of Mr. Lowenstein and Mr. Woocher's state ballot measure committee is "Yes on FAIR, a coalition of entrepreneurs, working people, community leaders such as Karen Bass, and other concerned citizens devoted to eliminating inhumane waste of taxpayer dollars on the political game of redistricting" (the "Yes on FAIR Committee").¹

The Yes on FAIR Committee is registered with the California Secretary of State and files periodic reports as required by state law. Each state report is signed by both Mr. Lowenstein and Mr. Woocher, as the principal officers of the Committee. Like many ballot measure committees, Yes on FAIR has also filed an application with the Internal Revenue Service for tax-exempt status as a 501(c)(4) unincorporated association. In connection with its application, Yes on FAIR submitted copies of its Articles of Association and Bylaws, both of which make clear that Mr. Lowenstein and Mr. Woocher are the association's only directors. No federal officerholder or federal candidate named Mr. Lowenstein or Mr. Woocher to draft the FAIR Act, to qualify it for the ballot, or to establish a committee to promote its passage.

Mr. Lowenstein has a long history of involvement with California ballot initiatives and with redistricting in particular. He is a law professor, a renowned election law expert, and was the first chairman of the California Fair Political Practices Commission ("FPPC"). He has worked for decades to ensure that the California Legislature retains responsibility for the drawing

¹Karen Bass is a California state legislator and was Speaker of the California State Assembly until March 1, 2010. Bass is identified in Yes on FAIR's official name only because California law requires the official name of certain ballot measure committees to identify state officerholders who have contributed \$50,000 or more to the committee. See Cal. Gov't Code § 84504(d). While Bass has not personally contributed to Yes on FAIR, state political committees associated with her have made two contributions totaling \$50,000. Although Bass is also a candidate for Congress, Bass has not and will not establish, finance, maintain or control Yes on FAIR, which has raised and will continue to raise the bulk of its funds from other sources.

10044283036

Jeff S. Jordan
June 18, 2010
Page 3

of district boundaries. Indeed, Mr. Lowenstein signed one of the ballot arguments opposing Proposition 77, a 2005 measure rejected by California voters that would have vested a panel of retired judges with redistricting authority. He also signed one of the ballot arguments opposing Proposition 11.

Mr. Lowenstein and Mr. Woocher, together, are responsible for all decisions regarding the Yes on FAIR Committee. They decide whom to hire and with whom to contract, and they have sole decision-making authority regarding Committee expenditures. Like many California ballot measure committees, Yes on FAIR has contracted with several consultants to assist in its efforts to raise funds and to qualify the FAIR Act for the ballot.

One of the principal consultants for Yes on FAIR is Michael Berman. Mr. Berman is a veteran of the California ballot measure process and an established expert in redistricting. Indeed, Mr. Berman has been involved in every redistricting in California since 1971. Mr. Berman is also a principal in the firm of Berman & D'Agostino, a well known political consulting firm with expertise in all facets of the California political process from redistricting, to campaign strategy and state mail. Mr. Berman is the brother of California Congressman Howard Berman.

Michael Berman, as a consultant to Yes on FAIR, routinely makes recommendations to the Committee regarding everything from fundraising strategy and messaging, to strategies for signature gathering. Whether to accept those recommendations lies within the sound discretion of Yes on FAIR's principal officers — Mr. Lowenstein and Mr. Woocher. Yes on FAIR is not controlled by anyone other than Mr. Lowenstein and Mr. Woocher. Neither Congressman Berman, nor any other federal officeholder or federal candidate, has ever played any role in the establishment, governance, or general operation of Yes on FAIR.

The Complaints in this matter, Mr. Munger and the state ballot measure committee that he established to promote the Voters FIRST Act for Congress, have little no secret of their desire to prevent the FAIR Act from qualifying for the November 2010 ballot. Indeed, the Voters FIRST Act for Congress is registered with the California Secretary of State as a committee with twin aims: (1) to support the Voters FIRST Act for Congress; and (2) to oppose the FAIR Act. See Yes on FAIR Response Exh. 1. As part of their political strategy, Mr. Munger and Voters FIRST Act for Congress apparently seek to portray the FAIR initiative as a measure that has been established by incumbent California legislators and representatives, including Congressman Berman, solely for their personal benefit.

On March 30, 2010, in pursuit of this strategy, the Voters FIRST Act for Congress and Mr. Munger filed a complaint with the FPPC alleging that Yes on FAIR violated state law by failing to list Michael Berman and Congressman Berman as principal officers of the Yes on FAIR Committee. Mr. Munger and the Voters FIRST Act for Congress announced the filing of their complaint in a widely distributed press release. Only one week later, however, on April 6, 2010, the FPPC summarily dismissed this complaint without investigation on the ground that it lacked "sufficient evidence." Yes on FAIR Response Exh. 2.

Several weeks after the FPPC dismissed their complaint, the Voters FIRST Act for Congress and Mr. Munger filed a Complaint with the Federal Election Commission (the

10044283037

Jeff S. Jordan
June 18, 2010
Page 4

"Commission"). In the instant Complaint, the Voters FIRST committee and Mr. Munger claim that Congressman Berman has "taken" unspecified "actions" to establish, finance, maintain, or control Yes on FAIR in violation of federal law. As discussed below, this Complaint, too, is unfounded, and should be summarily dismissed.

LEGAL ANALYSIS

The Complaint to the Commission is legally deficient in several key respects. First, it does not allege that any of the Yes on FAIR Respondents in any way violated federal law. Second, even as to Congressman Berman, the Complaint fails to satisfy the threshold "reason to believe" standard that governs the Commission's review of complaints. Third, the Commission's precedents make clear that the familial relationship between Yes on FAIR's consultant, Michael Berman, and his brother, Congressman Berman, is insufficient as a matter of law to support an inference that Yes on FAIR is in any way "controlled" by a federal officeholder.

As an initial matter, although the Commission's April 30, 2010 letters to the Yes on FAIR Respondents imply that the Commission could take action against the Yes on FAIR Respondents as a result of the Complaint, the Complaint does not, in fact, allege that any of the Yes on FAIR Respondents violated federal law.

And the allegations against Congressman Berman are legally deficient. The Complaint alleges that Congressman Berman has established, financed, maintained, or controlled Yes on FAIR. In determining whether an entity is established, financed, maintained, or controlled by a federal candidate or officeholder, the Commission will consider several factors, including whether the individual: (1) "has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures"; (2) "has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity"; (3) "causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the entity"; and (4) "had an active or significant role in the formation of the entity." 11 C.F.R. § 300.2(c)(2). In this case, the Complaint is devoid of any evidence or even specific allegations of involvement by Congressman Berman in the establishment, governance, decision-making, or operations of Yes on FAIR. Indeed, it cites *not one instance* of a decision made by Congressman Berman on the Committee's behalf. Nor could it. As set forth above, Yes on FAIR is not controlled by anyone other than Mr. Lowenstein and Mr. Woocher. This is clear from the Statement of Organization (Form 410) that is attached to the Complaint itself, as well as from the Articles of Association and Bylaws of Yes on FAIR, both of which provide that Mr. Lowenstein and Mr. Woocher are the only directors of the organization. Thus, the only evidence before the Commission — including the evidence attached to the Complaint — demonstrates that the Yes on FAIR committee is not controlled by a federal candidate or officeholder.¹

¹Congressman Berman's congressional committee contributed only \$10,000 to a multi-million dollar campaign to support the qualification and passage of the FAIR Act. And he is but one of many federal and state elected officials in California who have publicly supported the FAIR Act and who have contributed funds to support its qualification and passage.

10044283038

Jeff S. Jordan
June 18, 2010
Page 5

It is well established that "[t]he Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Federal Election Campaign Act]." Commissioners Mason, Sandstrom, Smith, and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2000); *see also* 11 C.F.R. § 111.4(a), (d). Without any specific evidence or even specific allegations, the instant Complaint falls well short of this exacting standard. Moreover, the Commission has made clear that hearsay press accounts, standing alone, are insufficient to support a "reason to believe" finding. *See, e.g.,* Commissioners Mason, Sandstrom, Smith, and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2000) (finding no "reason to believe" where complaint was based in part on "media accounts").

The fact that Congressman Berman's brother is a consultant to Yes on FAIR also provides no basis for a "reason to believe" finding. Michael Berman is not the agent of Congressman Berman and the Complaint contains no facts to suggest otherwise. And the Commission has made clear that a familial relationship is insufficient, standing alone, to establish agency. *See* FEC AO 2003-10 (concluding that Senator Harry Reid's son, Rory Reid, was not the agent of Senator Reid "solely because they are father and son").

In the end, the Complaint is little more than a political stunt -- an eleventh-hour effort by a political rival to gain the upper hand for at least one news cycle. *See* http://www.votersfirstact.org/pdf/release_FEC_Complaint-Berman.pdf (press release issued by Voters FIRST Act for Congress regarding the filing of this Complaint). One regulatory agency has already rejected this stunt as baseless. For the foregoing reasons, the Yes on FAIR Respondents respectfully request that the Commission do the same, and dismiss the Complaint without further action.

Sincerely,


Aimee Dudovitz

Enclosures

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EXHIBIT 1

10044283041

Statement of Organization Recipient Committee

Statement Type

☐ InitialNot yet qualified ☐ or

Type or print in ink

☒ Amendment

Use ID. number:

1221818

9/22/2009

Date qualified as committee

(If applicable)

☐ Termination - See Part 5

Use ID. number:

#

Date of Termination

1. Committee Information

NAME OF COMMITTEE

VOTERS FIRST ACT FOR CONGRESS

2. Treasurer and Other Principal Officers

NAME OF TREASURER

STEVEN S. LUCAS

STREET ADDRESS

STREET ADDRESS (AND P.O. BOX)

CITY

SAN RAFAEL

STATE

CA

ZIP CODE

94901

AREA CODE/PHONE

(415) 389-0800

MAILING ADDRESS (IF DIFFERENT)

OFFICIAL, FUND-AND ADDRESS

COUNTY OF SOURCE

MARIN

COUNTY WHERE COMMITTEE IS ACTIVE IF DIFFERENT

SUA

Attach additional information on appropriately labeled continuation sheets.

3. Verification

I have used all reasonable diligence in preparing this statement and to the best of my knowledge the information contained herein is true and complete. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 02/01/2010

DATE

Executed on 01/21/2010

DATE

Executed on

DATE

Executed on

DATE

By Steven S. Lucas

SIGNATURE OF TREASURER OR ASSISTANT TREASURER

By Charles T. Munster, Jr.

SIGNATURE OF CONTROLLING OFFICER/PROXY, CANDIDATE, OR STATE MEASURE PROPOSER

By

SIGNATURE OF CONTROLLING OFFICER/PROXY, CANDIDATE, OR STATE MEASURE PROPOSER

By

SIGNATURE OF CONTROLLING OFFICER/PROXY, CANDIDATE, OR STATE MEASURE PROPOSER

STATEMENT OF ORGANIZATION

Data Stamp

CALIFORNIA
FORM 410

For County Use only

Page 1

10044283042

SENT BY: STRUMWASSER & WEDCHER;

310 319 0150;

JUN-18-10 12:30;

PAGE 9/13

Statement of Organization Recipient Committee

Instructions on reverse

STATEMENT OF ORGANIZATION CALIFORNIA FORM	
Page 2	LD. NUMBER 1221618
COMMITTEE NAME VOTERS FIRST ACT FOR CONGRESS	

4. Type of Committee Complete the applicable sections.

Let the name of each controlling officialholder, candidate, or state measure proponent. If candidate or officialholder controlled, also list the elective office sought or held, and district number, if any, and the year of the election.

- Let the political party with which each officialholder or candidate is affiliated or check "non-partisan."
- If this committee acts jointly with another controlled committee, list the name and identification number of the other controlled committee.

NAME OF CANDIDATE/OFFICEHOLDER/STATE MEASURING PROPOSER	ELECTIVE OFFICE SOUGHT OR HELD (INCLUDE DISTRICT NUMBER IF APPLICABLE)	YEAR OF ELECTION	PARTY
CHARLES T. MUNGER, JR./PROPOSER	Sought Or Held Not Specified		<input checked="" type="checkbox"/> Non-Partisan
			<input type="checkbox"/> Non-Partisan

Let the financial institution where the campaign bank account is located (controlled "candidate election" committees only)

NAME OF FINANCIAL INSTITUTION	AREA CODE/PHONE	BANK ACCOUNT NUMBER
ADDRESS	CITY	STATE ZIP CODE

Let the financial institution where the campaign bank account is located (controlled "candidate election" committees only)

CANDIDATE(S) NAME OR MEASURE(S) FULL TITLE (INCLUDE BALLOT NO. OR LETTER)	CANDIDATE(S) OFFICE SOUGHT OR HELD OR MEASURE(S) JURISDICTION (INCLUDING DISTRICT NO., CITY OR COUNTY, AS APPLICABLE)	CHECK ONE
VOTERS FIRST ACT FOR CONGRESS	STATEWIDE BALLOT MEASURE - NOVEMBER 2010	SUPPORT <input checked="" type="checkbox"/> OPPOSE
FINANCIAL ACCOUNTABILITY IN REDISTRICTING ACT (09-0107) Ballot Number: T	STATEWIDE BALLOT MEASURE - NOVEMBER 2010	SUPPORT <input type="checkbox"/> OPPOSE <input checked="" type="checkbox"/>

10044283043

Statement of Organization
Recipient Committee

SENT BY: STRUMWASSER & WOCHER;

310 319 0156;

JUN-18-10 12:31;

PAGE 10/13

STATEMENT OF ORGANIZATION CALIFORNIA FORM 410 Page 3
I.D. NUMBER J351618

INSTRUCTIONS ON REVERSE

COMMITTEE NAME
VOTERS FIRST ACT FOR CONGRESS

4. Type of Committee (Continued)

Not formed to support or oppose specific candidates or measures in a single election. Check only one box:
☐ CITY Committee ☐ COUNTY Committee ☐ STATE Committee

PROVIDE BRIEF DESCRIPTION OF ACTIVITY

List additional sponsors on an attachment.

NAME OF SPONSOR

INDUSTRY GROUP OR AFFILIATION OF SPONSOR

STREET ADDRESS NO. AND STREET

CITY

STATE

ZIP CODE

Check box and provide the date this committee qualified as a small contributor committee. If the committee qualified as a small contributor committee on January 1, 2001, enter 1/1/01.

5. Termination Requirements By signing the verification, the treasurer, assistant treasurer and/or candidate, officer, or proponent certifies that all of the following conditions have been met:

- This committee has ceased to receive contributions and make expenditures;
- This committee does not anticipate receiving contributions or making expenditure in the future;
- This committee has eliminated or has no intention or ability to discharge all debts, loans received, and other obligations;
- This committee has no surplus funds; and
- This committee has filed all campaign statements required by the Political Reform Act disclosing all reportable transactions.
 - There are restrictions on the disposition of surplus campaign funds held by elected officers who are leaving office and by defeated candidates. Refer to Government Code Section 89519.
 - Additional filing obligations will be incurred if, after terminating, the committee receives or spends any funds, or receives the forgiveness of a loan, repayments of loans made to others, or any other receipts.

10044283044

MEMO: Ref: 10044283044
ADDITIONAL COMMITTEE ADDRESSES: 1215 K STREET, 82ND. SACRAMENTO, CA 95814; 3001 DOUGLAS BOULEVARD, #225, ROSEVILLE, CA 95661; 925 UNIVERSITY AVENUE, SACRAMENTO, CA 95825-0709